

Of Counsel:

Douglas J. Williams, Esq.
MERCHANT & GOULD, LLC
3200 IDS Center, 80 South Eighth Street
Minneapolis, MN 55402
(612) 332-5300

Kevin H. Marino (KM-4941)
John D. Tortorella (JT-3133)
MARINO & ASSOCIATES, P.C.
One Newark Center, 9th Floor
Newark, New Jersey 07102-5211
(973) 824-9300

Allan G. Altera, Esq.
MERCHANT & GOULD, LLC
133 Peachtree Street, N.E., Suite 4900
Atlanta, GA 30303
(404) 954-5100

Attorneys for Plaintiff Nisus Corporation

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

-----X
NISUS CORPORATION,

Plaintiff,

v.

PERMA-CHINK SYSTEMS, INC.,

Defendant.

: Case No. 04-1486 (KSH)

: **PLAINTIFF NISUS**
: **CORPORATION'S MOTION**
: **TO QUASH SUBPOENA OF**
: **MICHAEL TESCHNER AND**
: **FOR ATTORNEYS' FEES**

-----X
COMES NOW Plaintiff Nisus Corporation ("Nisus") and moves the Court pursuant to Federal Rule of Civil Procedure 45(c)(3)(A) to quash the subpoena served on Mr. Michael Teschner.

Mr. Teschner participated in the prosecution of the patent-in-suit in an action pending in the Eastern District of Tennessee, Civil Action No. 3:03-CV-120. Defendant Perma-Chink Systems, Inc. ("Perma-Chink") seeks to depose Mr. Teschner to obtain information that lacks any bounds. As the pages and pages of the propounded document

requests demonstrate, Perma-Chink is requesting information about seven different patent applications that Mr. Teschner prosecuted for Nisus in a period spanning over one decade. The underlying lawsuit only involves one count for patent infringement of a single patent and there are no pending counterclaims.

Significantly, much of the information that Perma-Chink is seeking is protected by the attorney-client privilege. Its document requests ask for materials that unquestionably are privileged, such as information about Nisus' patent filing strategy.

Instead of subpoenaing Mr. Teschner, Perma-Chink can obtain non-privileged information from other sources. Perma-Chink, in fact, has already concluded its Rule 30(b)(6) deposition of Nisus addressing the delineated subject of the prosecution of the patent-in-suit. In addition, there are three inventors of the subject matter claimed in the patent-in-suit. Perma-Chink has deposed each of them. Thus, there is no need to depose Mr. Teschner — other than to obtain privileged information. Rule 45(c)(3)(A) authorizes the Court to quash a subpoena that "requires disclosure of privileged or other protected matter," and the discovery sought by Perma-Chink fits squarely within this basis.

In addition, Perma-Chink's "Schedule A" setting forth its requested documents includes forty-one (41) separate categories of documents and spans eight (8) pages. Despite these voluminous requests, Perma-Chink only provided Mr. Teschner eleven days to respond — which encompasses only seven workdays. Rule 45, however, provides a *minimum* of a fourteen-day response time. Further aggravating the situation, Mr. Teschner traveled to Europe in the midst of the meager eleven-day production period and will not return until April 5 — six days after the production deadline. Rule

45(c)(3)(A) authorizes the Court to quash a subpoena that "fails to allow reasonable time for compliance" and "subjects a person to undue burden." Both bases exist here.

Perma-Chink has made no effort to abide by the Federal Rules of Civil Procedure, as its subpoena contravenes the requirements of Rule 26(b)(1), Rule 26(b)(3), and numerous parts of Rule 45. For example, requesting privileged communications from early 1990 via a third-party subpoena in a lawsuit involving a patent filed in mid-2001 demonstrates a disregard for the Federal Rules of Civil Procedure. As such, Nisus believes it appropriate for the Court to award its attorney's fees incurred in filing this Motion pursuant to Rule 45(c)(1).

Accordingly, Nisus respectfully requests that the Court quash the subpoena of Mr. Teschner and award its fees incurred to file the present Motion.

Dated: March 30, 2004

Of Counsel:

Douglas J. Williams, Esq.
MERCHANT & GOULD, LLC
3200 IDS Center, 80 South Eighth Street
Minneapolis, MN 55402
(612) 332-5300

Kevin H. Marino, Esq. (KM-4941)
John D. Tortorella, Esq. (JT-3133)
MARINO & ASSOCIATES, P.C.
One Newark Center, 9th Floor
Newark, New Jersey 07102-5211
(973) 824-9300

Allan G. Altera, Esq.
MERCHANT & GOULD, LLC
133 Peachtree Street, N.E., Suite 4900
Atlanta, GA 30303
(404) 954-5100

Attorneys for Plaintiff Nisus Corporation

By: John D. Tortorella /AB
John D. Tortorella